2018 IL App (2d) 161009-U
Nos. 2-16-1009 & 2-17-0007 Cons.
Order filed March 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF PAUL J. GODINEZ, Deceased,	)	Appeal from the Circuit Court of Kane County.
	)	No. 07-P-600
Shogren Performance Marine, LLC, Petitioner-Appellee and Cross-Appellant v. Elizabeth Verzani, Respondent-Appellant and Cross-Appellee.	)	Honorable James R. Murphy, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly granted partial summary judgment in favor of the Estate for breach of fiduciary duty where the executor failed to assert claim for disputed insurance proceeds on behalf of the Estate but asserted her own claim to the proceeds and negotiated a distribution of the proceeds with other parties with claims similar to that of the Estate; (2) the trial court properly granted summary judgment in respondent's favor as to conversion where petitioner failed to show that it had an established right to any property held by the respondent; (3) trial court erred in striking respondent's demand for a jury trial. Affirmed in part, vacated in part, and remanded for jury trial.

¶ 2 I. BACKGROUND

¶ 3 This appeal arises out of the claims of various parties for the proceeds of life insurance policies on the life of Paul J. Godinez. Per the 1998 judgment of dissolution of his marriage to

Adrianna Sormani, Godinez was required to name his two minor children as sole, irrevocable beneficiaries of any life insurance on his life until each child reached the age of 21. Godinez subsequently purchased two $1,000,000 life insurance policies from American General Life Insurance Company (AIG) and named his current wife, respondent Elizabeth Verzani, as sole beneficiary.

¶ 4 On April 14, 2007, Godinez purportedly met with his insurance broker, John Haar, and signed change of beneficiary forms as to one of the policies (YM00082453). Godinez named as his beneficiaries his estate (45%), Haar (8%), Steven Soukup (16%), and Alexander Sugar (31%). He also purportedly signed two blank change of beneficiary forms and gave them to Haar. On April 17, Godinez purportedly called Haar and authorized him to use one of the signed but blank forms to name B. D. Van Stavern as a 45% beneficiary, and Haar faxed the form to AIG. On April 28, Godinez purportedly authorized another change of beneficiary, naming his father John as a 45% beneficiary. In a letter dated April 30, AIG informed Godinez that it was unable to complete his request until certain items had been resolved, including using only one form to name his beneficiaries and insuring that the primary and contingent beneficiary designations each equal 100 percent. Godinez died on May 10 without addressing the issues of the AIG letter. Verzani was subsequently appointed as administrator of Godinez's estate.

¶ 5 Sormani petitioned to open a probate estate in Lake County and also filed a declaratory action regarding the proceeds of the disputed AIG life insurance policy. AIG had previously deposited $2,002,730 ($1,001,680 related to the disputed policy) with the circuit court clerk of Lake County pursuant to a decree of interpleader, citing competing claims to the proceeds of the policy from the Estate, Sormani (as mother of the minor children), Verzani, Soukup, Haar, Van Stavern, and John Godinez. Verzani filed an appearance and a counterclaim in the declaratory

action on her own behalf; however, she did not file an appearance on behalf of the estate or seek any relief on its behalf. A settlement regarding the proceeds was eventually reached. Haar, Soukup, and Sugar were to receive $135,000 to split as they agreed.[1] The remainder, $865,000, was allocated to Sormani and Verzani to be divided as they agreed. Verzani ultimately received $317,815.33 of those proceeds. The settlement agreement made no mention of the Estate.

¶ 6 The probate case was transferred to Kane County. Verzani, who had been appointed as executor of the estate, filed a final accounting of the estate, showing no property, no receipts and disbursements of more than $48,000 in attorney fees and costs to the firm of Querrey & Harrow "incurred in defending litigation that turned out to involve a non-probate asset (ie. [sic] life insurance proceeds)," resulting in a cash shortfall of $48,227.30. Verzani was eventually removed as executor of the estate and replaced by independent administrator Steven Newell, who filed a citation to discover assets in July 2010. This citation sought information from Verzani regarding an automobile and the proceeds of the AIG life insurance policy, alleging that the policy named the Estate as a beneficiary. The citation led to a temporary restraining order barring the transfer of any funds out of Verzani's bank accounts other than her checking account.

¶ 7 In November 2011, Newell filed a petition to convert the discovery citation to a citation seeking to recover the automobile and the insurance proceeds. On December 1, 2011, the trial court ordered a freeze on all of Verzani's non-checking account assets at West Suburban Bank. The court granted Newell's petition to convert on May 3, 2012, and Verzani filed a jury demand on June 1, 2012.

[1] Van Stavern and John Godinez had previously had default judgments entered against them and were no longer parties to the declaratory action.

¶ 8 On June 14, 2012, Newell filed a three-count petition to recover estate assets, alleging breach of fiduciary duty (count I) and conversion (count II) against Verzani and seeking punitive damages (Count III). Shogren Performance Marine, LLC, which had a Cook County judgment against Godinez and whose claim against the estate in the amount of approximately $229,000 had been allowed in 2009, was substituted for Newell as petitioner in October 2012.[2] The freeze on Verzani's bank account was limited to $320,000, and all other amounts were released to her on February 7, 2013.

¶ 9 Shogren and Verzani filed cross motions for summary judgment on the citation. On November 25, 2013, the trial court granted partial summary judgment in favor of Shogren as to breach of fiduciary duty but denied judgment on the conversion count. The court also denied Verzani's motion in its entirety. The court imposed a constructive trust on $317,815.33 in Verzani's bank account "subject to further ruling on the extent of the 'Res' of the Trust" and declared Verzani "to be a constructive trustee as to that fund in her possession but subject to proofs or further ruling on law as to what the *res* is." The court noted that that it had granted "only a partial summary judgment" and that "the question of damages or the question of the extent of the constructive trust still remains." The court also granted Shogren leave to file "an amended complaint or petition that alleges the constructive trust in order to conform the pleadings with the proofs under this summary judgment." The court denied Verzani's request for findings pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010), but Verzani appealed nonetheless, with Shogren cross-appealing. This court dismissed both the appeal and the cross-appeal for lack of jurisdiction. See *In re Estate of Godinez*, 2015 IL App (2d) 140491-U.

[2] Newell was discharged from the case in January 2013, replaced by Diana Law, Kane County Public Administrator.

¶ 10 Shogren eventually filed a second-amended citation to recover assets, alleging breach of fiduciary duty and conversion. Verzani then filed a motion to vacate, reconsider, and revise the trial court's order of November 25, 2013, in which the court had granted partial summary judgment in favor of Shogren as to breach of fiduciary duty; Verzani argued that the deposition testimony of John Haar demonstrated that Godinez did not intend his estate to be a beneficiary of the policy. The trial court denied the motion. Verzani also filed a motion for summary judgment on the second-amended citation to recover assets. The trial court granted summary judgment in Verzani's favor as to conversion but denied the motion as to breach of fiduciary duty.

¶ 11 In March 2016, Law moved to dismiss Verzani's June 1, 2012 jury demand. The trial court subsequently granted the motion. Shogren also filed a motion to require Verzani to transfer almost $318,000 from her West Suburban Bank account to the circuit court clerk. This motion, too, was granted, and Verzani transferred the funds.

¶ 12 Verzani filed an answer and affirmative defenses to Shogren's second-amended petition. On the eve of trial, Shogren moved to bar the testimony of Haar and Debbie Sutton, two potential witnesses that Verzani had subpoened. The trial court granted the motion regarding Sutton and granted in part the motion as to Haar, limiting his testimony to events occurring after Godinez's death.

¶ 13 Verzani was the only witness to testify at trial, being called by both Shogren and Law and testifying on her own behalf. On November 22, 2016, the trial court ruled that Verzani was "acting as constructive trustee in negotiating (or not negotiating) for the estate's interest in the interpleader to the extent that the estate's claim should have been asserted" and was unjustly enriched when she claimed a portion of the proceeds "without even acknowledging the estate's potential claim." The court calculated the *res* of the constructive trust to be $203,766.93, to be

turned over from the funds on deposit to Law on December 1, 2016; the balance was to be returned to Verzani.

¶ 14 The trial court denied the various posttrial motions of both Verzani and Shogren. This appeal and cross-appeal timely followed.

¶ 15 II. ANALYSIS

¶ 16 Verzani now raises numerous contentions regarding the trial court's disposition of the cross motions for summary judgment on count I (breach of fiduciary duty). Verzani brings these arguments against the trial court's decisions on the original three-count citation and the two-count second-amended citation. As both citations are substantially similar, we will address the arguments as one.

¶ 17 "Summary judgment is proper when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Bremer v. City of Rockford*, 2016 IL 119889 ¶ 20, quoting 735 ILCS 5/2-1005(c) (West 2008). Summary judgment is a drastic measure that should be granted only if the movant's right to judgment is clear and free from doubt. *Seymour v. Collins*, 2015 IL 118432 ¶ 42. On a motion for summary judgment, the trial court must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Id.* Summary judgment is not appropriate where: (1) there is a dispute as to a material fact; (2) reasonable persons could draw divergent inferences from undisputed material facts; or (3) reasonable persons could differ on the weight to be given the relevant factors of a legal standard. *Id.* A defendant who moves for summary judgment may satisfy its burden of production by affirmatively showing that some element of the case must be resolved in its favor or by establishing that the plaintiff cannot prove an essential element of the cause of action.

In re Estate of Lis, 365 Ill. App. 3d 1, 9 (2006). We review *de novo* rulings on summary judgment questions. *Bremer*, 2016 IL 119889 ¶ 20.

¶ 18 To state a claim for breach of fiduciary duty, a plaintiff must be allege that: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) the breach proximately caused the injury of which the plaintiff complains. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000).

¶ 19 Verzani argues that, in order to show a fiduciary duty here, Shogren was required to prove that the Estate was a beneficiary of the life insurance policy. According to Verzani, she had no duty to assert a claim on the life insurance proceeds on behalf of the Estate because the Estate was not a beneficiary of the life insurance policy on the day that Godinez died. As Shogren could not show a duty, let alone a breach of that duty or any damages, the trial court should have denied judgment in Shogren's favor and entered summary judgment in her favor. We disagree.

¶ 20 First, it cannot be gainsaid that, as executor of the Estate, Verzani had a fiduciary duty to the Estate. The representative of an estate has a fiduciary obligation to all of the individuals having an interest in the decedent's estate, including the decedent's heirs and creditors. *In re Estate of Cappetta*, 315 Ill. App. 3d 414, 429 (2000). As an executor or administrator is a fiduciary to all those interested in the estate, she is held to a high standard of fair dealing and diligence. *In re Estate of Wallen*, 262 Ill. App. 3d 61, 72 (1994).

¶ 21 Verzani argues that she did not violate any duty because the insurance policy proceeds were not an asset of the estate. An administrator's fiduciary relationship does not extend to all affairs and transactions between the administrator and beneficiaries; the relationship is fiduciary only so far as the administration of the estate is involved. *Estate of Lis*, 365 Ill. App. 3d at 10. Verzani posits that an executor or administrator's fiduciary duty does not extend to collecting

and administering an asset that is not part of the estate. According to Verzani, the admissions in Shogren's pleadings and the deposition testimony of Haar, taken in the Lake County declaratory judgment action (which was attached to Shogren's motion for summary judgment) show that the Estate was not a beneficiary of the life insurance policy on the day that Godinez died; thus, the failure to seek any of the proceeds on behalf of the Estate was not a breach of fiduciary duty. We disagree.

¶ 22 "The purposes of administrating an estate are to conserve the personal assets of the estate, including the collection of all debts due to the decedent; to pay all debts and taxes owed by the decedent and her estate; and to properly distribute the residue among the heirs at law according to the terms of the decedent's will or, absent a will, the statute of descent and distribution." *Estate of Lis*, 365 Ill. App. 3d at 9. Generally, it is the duty of an executor or administrator to perform these tasks and, in so doing, carry out the wishes of the decedent and act in the best interest of the estate. *Id*.

¶ 23 In *Estate of Lis*, heirs of a decedent filed a petition to surcharge the administrator of the estate, alleging that the administrator breached her fiduciary duty by directing that the decedent's profit sharing plan be distributed to her father instead of to the estate. The trial court granted summary judgment in favor of the administrator, finding that the plan was governed by federal law (ERISA) and not subject to the purview of the probate court. *Id* at 8. The appellate court affirmed, noting that the plan could never have been distributed to the estate since at least one blood relative was still living; "the Plan was not part of Shirley's estate and never would have been." *Id* at 12.

¶ 24 Here, Verzani similarly argues that the Estate could never have been a beneficiary of the life insurance policy; AIG was unable to process any of Godinez's beneficiary change requests

before his death, thereby leaving Verzani as the last properly named beneficiary. First, unlike in *Estate of Lis*, we are unaware of any law (whether federal or state) that demanded an outcome that precluded the Estate from receiving policy proceeds. Indeed, the ultimate distribution of the proceeds in this case was the result of Verzani's negotiations with Sormani, Haar, Soukup, and Sugar, not an adjudication. Sormani's children (whom she represented) had never been designated as beneficiaries; their claim was based on the judgment of dissolution of marriage (that Godinez failed to obey) that ordered Godinez to name the children as sole, irrevocable beneficiaries of any insurance on his life until each child reached the age of 21. However, Haar, Soukup, and Sugar were purportedly designated as beneficiaries at the same time as the Estate, and their designations were similarly not processed by AIG. No one with whom Verzani shared the life insurance proceeds had any greater claim than the Estate to those proceeds in terms of Godinez's stated or demonstrated intent that they do so. Verzani was aware of this fact. Yet Verzani, executor of the Estate, chose them, and not the Estate, to partake in the life insurance proceeds with her.

¶ 25 Verzani's arguments rest on a cramped, incomplete vision of her role as executor of the Estate. Many possible distributions of the life insurance proceeds were possible, based on the confused attempts to change beneficiaries and the existence of the judgment of dissolution. If it was reasonable for Verzani to appear in the declaratory action on her own behalf, it was reasonable for her, as executor of the Estate, to appear on behalf of the Estate. Verzani owed the Estate the duty to protect its interests in the life insurance proceeds, whatever they may be, and represent its potential claims to part of those proceeds. This she did not do. All of the ultimate recipients of those proceeds had some cloud attached to their claims; the Estate had no less of a claim because of the cloud attached to its claim. There is no genuine issue as to any material fact

regarding Verzani's fiduciary duty owed to the Estate and her breach of that duty. As a matter of law, Shogren was entitled to the partial judgment. We find no error here.

¶ 26 In a related issue, Verzani contends that the trial court erred in denying her a motion to vacate, reconsider, and revise the trial court's order of November 25, 2013. Verzani attached to that motion a transcript of a new deposition of Haar, taken in March 2016. Verzani argues that Haar's new deposition testimony demonstrated that Godinez did not intend his estate to be a beneficiary of the policy. According to Verzani, the trial court entered its partial summary judgment on erroneous or incomplete information and should have considered the new deposition.

¶ 27 The purpose of a motion to reconsider is to bring the trial court's attention to (1) newly discovered evidence not available at the time of the hearing; (2) changes in the law; or (3) errors in the court's previous application of existing law. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010). A party seeking reconsideration based on newly discovered evidence must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable. *Id.* In addition, the newly discovered evidence must be material and so conclusive that it would probably change the result of the court's order. *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 409 (2005). "A trial court's decision to grant or deny a motion to reconsider lies within its sound discretion, and we will not disturb such a ruling absent an abuse of discretion." *Simmons*, 406 Ill. App .3d at 324.

¶ 28 Verzani makes no argument as to why this second Haar deposition fulfills any of the requirements of newly discovered evidence. She merely concludes that the trial court had erroneous or incomplete information at the time of the hearing. In light of this incomplete

presentation of an argument, we can find no abuse of the trial court's discretion in denying the motion, and we find no error here.

¶ 29 Verzani next contends that the trial court erred in granting Law's motion to strike Verzani's jury demand. Whether a litigant has a right to a jury trial is a question of law that we review *de novo*. *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488 (2004).

¶ 30 Shogren's citation to recover assets was brought pursuant to section 16-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/16-1 (West 2012). This section has been interpreted to authorize two types of citation proceedings: (1) to obtain discovery as to assets of the estate; and (2) an adversary proceeding to determine the right and title to personal property. *Guardianship of Holm v. Holm*, 236 Ill. App. 3d 805, 808 (1992). In such proceedings, a trial court:

> "may examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property and may enter such orders and judgment as the case requires." 755 ILCS 5/16-1(d) (West 2016).

However, section 16-3 of the Probate Act provides:

> "Upon the demand of a party to a proceeding under Section 16-1 or 16-2, questions of title, claims of adverse title and the right of property shall be determined by a jury." 755 ILCS 5/16-3 (West 2016).

This section establishes the right to a jury trial in actions for citations to discover assets and for claims against the estate. See *In re Estate of Mulvaney*, 128 Ill. App. 3d 133, 136 (1984).

¶ 31 Here, Shogren petitioned to convert its discovery citation to a citation to recover assets on November 29, 2011. The petition was granted on May 3, 2012, without prejudice to filing an answer or responsive pleadings. Verzani filed her jury demand on June 1, 2012, thirteen days

before Shogren filed its citation to recover assets and thus converted the action from a proceeding of discovery to an adversarial proceeding to determine the right and title to personal property.

¶ 32 In the trial court, Shogren argued that Verzani's jury demand was not timely; however, on appeal, Shogren no longer raises that argument. Instead, Shogren merely argues that Verzani "does not identify any issue of fact that should have been resolved by a jury." However, the trial court recognized that a genuine issue of material fact remained to be determined when it granted only partial summary judgment to Shogren and held an evidentiary hearing on the amount of the proceeds in Verzani's possession that constituted the *res* that was to be turned over to the Estate. Verzani's duty to the Estate to represent its interest, if any, in the insurance proceeds, and her breach of that duty, had been established; however, the nature and extent of any damages, whether nominal or compensatory, remained to be established. This clearly was an issue of fact that needed to be resolved, and because Verzani filed a jury demand, it should have been resolved by a jury, not the trial court. The trial court erred in granting Law's motion to strike Verzani's jury demand, and the cause must be remanded for a jury trial on the amount, if any, that must be turned over to the Estate.

¶ 33 As we have concluded that this cause must be remanded for a jury trial, we will address certain evidentiary issues that may arise on remand.

¶ 34 Verzani next contends that the trial court erred in granting Shogren's motion to bar the testimony of Debbie Sutton, an employee of AIG. A trial court's ruling on an evidentiary issue will not be reversed absent an abuse of discretion. *Gunn v. Sobucki*, 352 Ill. App. 3d 785, 789 (2004).

¶ 35 In the trial court, Shogren sought to bar Sutton's testimony because "[t]his is a 2007 case, [and] there is no new evidence Debbie Sutton could provide." Allowing Sutton to testify "would be a waste of time and resources and could not possibly lead to any new information that could clarify anything after nine (9) years of litigating this matter." Verzani informed the trial court that she intended to call Sutton to testify as to whether AIG accepted the change of beneficiary forms. The trial court found that "we know" that AIG did not process the change of beneficiary designations and sent a letter informing Godinez of that fact; further, "we're beyond" what was true on the date of Godinez's death. The court then granted the motion "totally" as to AIG.

¶ 36 This ruling was made in the context of proceeding to a bench trial to determine the amount of the *res*. That determination cannot be made in a vacuum. The jury on remand will not already know of the tangled factual background of this case that will be necessary to answer that question. A party is entitled to present evidence which is relevant to its theory of the case. *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 241 (1988); *Tsoukas v. Lapid*, 315 Ill. App. 3d 372, 383 (2000). Verzani is not limited to using only the documentary evidence already generated in this case to present its case to the jury. We need not, and cannot, determine here exactly what testimony Sutton may give on remand; the trial court must still exercise its discretion in the context presented at trial. However, Sutton may not be barred from testifying merely because the court already knows what she is testifying to.

¶ 37 Verzani also contends that the trial court erred in barring the testimony of insurance broker John Haar. Again we will review this decision for an abuse of discretion. See *Gunn*, 352 Ill. App. 3d at 789.

¶ 38 As in its motion to bar Sutton's testimony, Shogren argued that Haar could provide no new evidence and that his testimony would be a waste of time. For the same reasons stated

above, such reasoning cannot be used to bar Haar from testifying. We note, however, that Shogren also argued in the trial court that Haar's testimony was barred under the Dead Man's Act (735 ILCS 5/8-201 *et seq*. (West 2014)). The trial court granted Shogren's motion to bar in part, barring Haar from testifying to any matters that occurred before May 11, 2007, the date of Godinez's death.

¶ 39 While such a ruling seems to arise from application of the Dead Man's Act, the trial court never mentioned the Dead Man's Act in its oral ruling:

> "So we are talking about maybe Mr. Haar can come in and testify that, yeah, I did receive a certain percentage of that money and yes, I had a claim for—as a beneficiary and that's what I received. But I'm not going to let him talk about what he thinks happened prior to the Lake County settlement.
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> So if you want to bring him in just to testify on what he received and—I think that can be stipulated to by all sides as to what he received. It already has been, but I don't think we can start testifying about what he did offer, what he was told by the decedent to do, and then what he did. That's all things that have been adjudicated here."

Further, Shogren does not argue the application of the Dead Man's Act here on appeal. Therefore, we will not make any ruling regarding the application of the Dead Man's Act to the trial on remand.

¶ 40 In its cross-appeal, Shogren contends that the trial court erred in granting summary judgment in favor of Verzani on count II (conversion) of the second-amended citation. Again, we must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Seymour*, 2015 IL 118432 ¶ 42. Although the plaintiff need not prove its case at the

summary judgment stage, it must present sufficient evidence to create a genuine issue of material fact. *Keating v. 68th and Paxton, L.L.C.*, 401 Ill. App. 3d 456, 470 (2010). If a plaintiff fails to present sufficient evidence to establish an element of her cause of action, it has not sustained its burden of making a *prima facie* case, and summary judgment is appropriate. See *Berke v. Manilow*, 2016 IL App (1st) 150397 ¶ 32.

¶ 41 "Conversion is the unauthorized deprivation of property from the person entitled to its possession." *Sandy Creek Condominium Ass'n v. Stolt and Egner, Inc.*, 267 Ill. App. 3d 291, 294 (1994). To state a cause of action for conversion, a plaintiff must allege: (1) the unauthorized and wrongful assumption of control, dominion, or ownership by the defendant over the personal property of another; (2) the plaintiff's right in the property; (3) the plaintiff's absolute and unconditional right to immediate possession of the property; and (4) a demand for possession of the property. *Id.* Money may be the subject of a conversion action if the sum of money is capable of being described as a specific chattel; however, an action for the conversion of funds may not be maintained to satisfy an obligation to pay an indeterminate sum of money. *Id.* If such is the case, the cause of action lies not in conversion, but in debt. *Id.*

¶ 42 Here, we find that Shogren has failed to establish an essential element of the cause of action—Verzani's control over Estate property. While we have concluded that Verzani owed a duty to the Estate to assert a claim on the Estate's behalf to a portion of the insurance proceeds, there is nothing in the record that shows that the Estate had an established right to any property, including those insurance proceeds, held by Verzani. As Shogren has failed to establish this element of its required *prima facie* case, summary judgment in Verzani's favor was appropriate on count II. We find no error here.

¶ 43 III. CONCLUSION

¶ 44 For these reasons, the trial court's grants of summary judgment are affirmed. However, the trial court's November 22, 2016 judgment regarding the *res* of the constructive trust is vacated, and the cause is remanded for a jury trial on that issue consistent with this order.

¶ 45 Affirmed in part, and vacated in part, and remanded for further proceedings.